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In the Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN SECURITY COUNCIL EDUCATION FOUNDATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-109a) appears at 5 Med. L. Rptr. 1193, but is not yet officially reported. The opinion of the panel (Pet. App. 110a-173a) appears at 4 Med. L. Rptr. 1516. The opinion of the Federal Communications Commission (Pet. App. 174a-182a) is reported at 63 F.C.C. 2d 366.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 29, 1979. The petition for a writ of certiorari was filed on September 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the Federal Communications Commission abused its discretion in concluding that petitioner's complaint against CBS Inc. failed to make a prima facie showing of a fairness doctrine violation because, *inter alia*, the complaint did not involve a particular, well-defined issue.

STATEMENT

On September 8, 1976, petitioner filed a complaint with the Federal Communications Commission alleging that CBS Inc. had violated the fairness doctrine[1] with respect to its coverage of "national security" issues on its television network news programming (Pet. App. 174a). Petitioner contended that CBS consistently aired a preponderance of news slanted toward the "dovish" point of view, rather than "hawkish" or "hardline" news on the same subjects.[2]

The complaint covered the period 1972-1976, but was based largely on a study by petitioner of CBS's 1972 TV news programming, which is summarized in a book entitled *TV and National Defense* (Pet. App. 174a-177a).[3] In that study petitioner purported to analyze all

[1]The fairness doctrine requires that each broadcaster: (1) devote a reasonable percentage of its broadcast time to coverage of controversial issues of public importance, and (2) provide a reasonable opportunity for the presentation of conflicting views on such issues. The doctrine was originally developed by the Commission as an outgrowth of the public interest standard of the Communications Act of 1934, 47 U.S.C. 151 *et seq.* See, *e.g.*, 47 U.S.C. 303(f); 307(a), (d); 309(a). In 1959 it was explicitly made part of the Act, 47 U.S.C. 315(a).

[2]The terminology is petitioner's. See, *e.g.*, Pet. 4.

[3]E. Lefever, *TV and National Defense, An Analysis of CBS News, 1972-73* (1974). This book was incorporated by reference in petitioner's complaint. A copy has been made available to the Court (Pet. 8 n.6).

news items aired on the *CBS Evening News* in 1972 that contained explicit opinions on the following subjects: (1) United States military and foreign affairs (including the U.S.-U.S.S.R. military balance); (2) Soviet military and foreign policy; (3) China's military and foreign policy; and (4) Vietnam affairs. *TV and National Defense, supra,* at 78; Pet. App. 3a-4a. In petitioner's view there were 274 items concerning these issues (Pet. App. 5a n.6).[4]

Petitioner divided each news item selected for its analysis into sentences and classified each sentence as Viewpoint A, B or C according to the following criteria (Pet. App. 5a):

> *Viewpoint A* holds that the threat to U.S. security is more serious than perceived by the government or that the United States ought to *increase* its national security efforts; *Viewpoint B* holds that present government threat perception is essentially correct or U.S. military and foreign policy efforts are adequate [;] and *Viewpoint C* holds that the threat to U.S. security is less serious than perceived by the government or that U.S. national security efforts should be *decreased.*

[4]These items included stories on President Nixon's remarks and congressional debate on the Strategic Arms Limitation Treaty (SALT), Defense Secretary Laird's and various Senators' statements on the defense budget, Administration and congressional statements concerning the Trident submarine system and the B-1 bomber, the Democratic Party platform on amnesty for draft evaders, Soviet Union involvement in the Middle East, presidential campaign statements of Senator McGovern concerning the defense budget, the space shuttle and troops in Western Europe, South Korea and Indochina, the President's trip to China, the Vietnam War, and the activities of Chinese school children (Pet. App. 4a). This list is taken from the limited number of examples in the book, most of which were taken from a single month's broadcasts. An analysis of all 274 items was not made available (Pet App. 4a n.5, 19a n.33).

TV and National Defense, supra, at 78 (emphasis in original). Using this methodology, petitioner found that 3.54% of the sentences tabulated reflected Viewpoint A, 34.63% reflected Viewpoint B and 61.83% reflected Viewpoint C (Pet. App. 5a-6a). Petitioner therefore concluded that CBS had violated the fairness doctrine by failing to provide a reasonable opportunity for the expression of viewpoints falling within its "A" category.

The Commission dismissed petitioner's complaint on the ground that petitioner had failed to make a prima facie showing that the fairness doctrine had been violated. The Commission concluded, *inter alia*, that petitioner had not based its complaint on a "particular, well-defined issue" (Pet. App. 178a-180a).

On appeal, a panel of the court of appeals reversed the Commission's decision by a 2-1 vote (Pet. App. 110a-173a). On rehearing en banc, the court vacated the opinion of the panel and affirmed the Commission's decision by a 6-3 vote (Pet. App. 1a-109a). The court held (Pet. App. 18a):

> We affirm the Commission's decision that ASCEF failed to base its complaint on a particular, well-defined issue because (1) the indirect relationships among the issues aggregated by ASCEF under the umbrella of "national security" do not provide a basis for determining whether the public received a reasonable balance of conflicting views, and (2) a contrary result would unduly burden broadcasters without a countervailing benefit to the public's right to be informed.

On the first point, the court stated (Pet. App. 22a):

> An issue is not a "particular, well-defined" issue for fairness doctrine purposes if the separate issues comprising it are so indirectly related that a view on one does not, in a way that would be apparent to an average viewer or listener, support or contradict a view on any other. When an "umbrella" issue is that ill-defined, there is no reasonable basis for determining whether the public is receiving balanced conflicting views.[5]

Second, the court found that acceptance of petitioner's type of complaint would place a particularly heavy burden on broadcasters that "would, in practice, defeat the policy of 'encouraging robust, wide-open debate' " (Pet. App. 24a), stating (Pet. App. 26a; footnote omitted):

> ASCEF's blunderbuss approach to the fairness doctrine would contribute little, if anything, toward achievement of the fairness doctrine's goal while posing all the dangers associated with government administration of fairness obligations. The prima facie case requirements are designed to weed out those complaints that would burden broadcasters without sufficient likelihood that a countervailing

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[5]The court also expressed doubt that petitioner had satisfied the requirement that opinions on national security were "meaningfully discussed" in each of the challenged telecasts (Pet. App. 22a n.39). It noted the Commission's query as to how reports concerning the non-military affairs of the Chinese government related to threats against U.S. security (*ibid.*, citing Pet. App. 179a-180a). For example, the following statement concerning education in China made by a private citizen who had recently returned from that country was categorized as a "C" viewpoint:

> Outwardly [the children] were only exposed to mainly [*sic*] songs and dances with a touch of revolutionary fervor. The dances, the shows, the music and so on concentrated largely on patriotism, social justice, dedication to work, patience, and above alk, selfless service to the public.

TV and National Defense, supra, at 92.

benefit will be gained. We uphold the Commission's determination that ASCEF failed to present prima facie evidence of a fairness doctrine violation.[6]

The dissent (Pet. App. 46a-79a) found that the issue defined by petitioner, though "large" and "multi-faceted" (Pet. App. 58a), was specific, and that the Commission abused its discretion in finding that the issue lacked the specificity required to establish a prima facie case (Pet. App. 60a).

ARGUMENT

Petitioner contends (Pet. 21-22) that this case demonstrates a general "abusive practice" on the part of the Commission consisting of a "wholesale rejection of substantive fairness complaints upon alleged procedural grounds." This contention is without foundation. This case simply presents the issue of whether the FCC erred in concluding that petitioner did not establish a prima facie showing that CBS had violated the fairness doctrine. As the court of appeals found, the Commission was correct; petitioner did not make such a prima facie showing.

1. The Commission outlined the elements of the fairness doctrine in *Applicability of the Fairness Doctrine*, 40 F.C.C. 598 (1964). In particular, a complaint must set out a prima facie case of a violation, including (*id.* at 600):

> (1) the particular station involved; (2) *the particular issue of a controversial nature discussed over the air*; (3) the date and time when the program was carried; (4) the basis for the claim that the station has

[6]The court did not reach the Commission's other grounds for dismissing petitioner's complaint (Pet. App. 26a n.43).

> presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints. [Emphasis added; footnote omitted.]

These criteria have been reaffirmed by the Commission and consistently approved by the courts.[7]

In this case, petitioner's evidence of allegedly unbalanced coverage did not relate to a well-defined issue. Rather, a broad range of issues were lumped under the umbrella of "national security." Consequently, as the court found (Pet. App. 19a-20a), viewpoints that had little discernible relationship to one another at the time they were aired were treated by petitioner as viewpoints on the same issue. Thus, a "Viewpoint A" statement on the Strategic Arms Limitation Talks was treated as a contrasting view to a "Viewpoint C" statement on amnesty for draft evaders.

If petitioner had focused on individual issues, the Commission could have examined the actual views expressed to determine whether a prima facie case of imbalanced coverage was presented. Instead, as the court found (Pet. App. 22a-23a), petitioner categorized all views on the many issues involved into three artificial categories. Compounding the difficulty with these artificial categories is the fact that Viewpoint B was

[7]See *Reconsideration of the Fairness Report*, 58 F.C.C. 2d 691, 696 (1976), aff'd in pertinent part, *National Citizens Committee for Broadcasting* v. *FCC*, 567 F. 2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978); *Broadcast Procedure Manual*, 49 F.C.C. 2d 1, 5 (1974); *Fairness Report*, 48 F.C.C. 2d 1, 19 (1974). See *Hale* v. *FCC*, 425 F. 2d 556, 558-559 (D.C. Cir. 1970); *Democratic National Committee* v. *FCC*, 460 F. 2d 891, 907-908 (D.C. Cir.), cert. denied, 409 U.S. 843 (1972).

defined in petitioner's study as "an opinion that supports the current policy and declared objectives of the U.S. Government" (Pet. App. 5a n.7). Thus, statements that national security should be increased were characterized as "Viewpoint B" if expressed in support of a Nixon Administration position.[8] This scheme inevitably resulted in a finding of a low percentage for Viewpoint A.

2. As the court below found (Pet. App. 24a), if petitioner's position were accepted that "national security," as treated in its study, should be considered a particular, well-defined issue, an unreasonable burden would be placed on broadcasters with no appreciable benefit to the public. The fairness doctrine is a regulatory tool that requires great sensitivity in its administration because of the important First Amendment concerns involved. As this Court stated in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973), "[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty." See also *Red Lion Broadcasting*

[8]For example, petitioner classified the following news report as Viewpoint B (*TV and National Defense, supra*, at 84; Pet. App. 5a n.7):

> The President warned that without new weapons systems as demanded by Defense Secretary Laird, national security would become jeopardized by the late 1970's. The Russians would gain a strategic superiority, and that would be an open invitation to what he called more instability and aggression especially in the Middle East. The President emphasized he also wants Congressional approval for his Nuclear Arms Agreements with Moscow but his stress was clearly on the new weapons. Thus, he seemed to side strongly with Laird in his running controversy with Capitol Hill over new defense appropriations.

Co. v. *FCC*, 395 U.S. 367, 390 (1969). Petitioner's broad "blunderbuss approach" (Pet. App. 26a) would lead to constant government scrutiny of the day-to-day programming decisions of television journalists. The burden of proving compliance with the fairness doctrine would be onerous if complainants were not required to allege a well-defined issue. Treatment of the issue urged by petitioner as raising a fairness doctrine question could inhibit journalists' decisions to cover issues that might be thought by third parties to touch on "national security," however remotely. Such a result would defeat the policy that debate on public issues should be "uninhibited, robust and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). See *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969). See also *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257 (1974).

This case simply involves the application of the established principles relating to the requirements for a prima facie showing of a fairness doctrine violation. The Commission correctly applied those principles, as the court of appeals found, and there is no occasion for further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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